Supreme Court of the United States

October Term, 1944.

No. 20.

WILLIAM E. ESENWEIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, *Ex Rel.* MAY H. ESENWEIN.

BRIEF FOR PETITIONER, WILLIAM F. ESENWEIN.

SIDNEY J. WATTS,
FRED C. HOUSTON,
Of Pittsburgh,
Counsel for Petitioner, William F. Esenwein.

BAKER & WATTS,
Of Counsel.

BATAVIA TIMES JOB PRINTERS
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVES
706 SECOND AVENUE, PITTSBURGH, PA.

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Official Report of Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 348 Pa. 455, 35 A. 2d 335 (R. 59). The opinion of the Superior Court of Pennsylvania, which was affirmed by the Supreme Court, is reported in 153 Pa. Super. 69, 33 A. 2d 675 (R. 51).

Jurisdiction.

The jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 237(b) of the Judicial Code, as amended, 28 U. S. C. A. § 344(b).

Concise Statement.

Petitioner and respondent were married in Pennsylvania and lived there prior to and after their separation in the year 1919 until the summer of 1941, when petitioner left Pennsylvania and removed to Nevada. He has not since returned to Pennsylvania. In the latter part of October, 1941 he left Nevada and removed to Cleveland, Ohio, where he has since resided.

In 1922 relator wife filed an information (R. 32) in the County Court of Allegheny County, Pennsylvania, praying for the issuance of a warrant for petitioner's arrest for alleged non-support. She obtained a support order with which, as modified from time to time, petitioner complied until shortly after December 8, 1942, when he presented his petition praying for a total release from a modified order, entered December 8, 1942. Petitioner based his said application for relief upon the ground that he had been divorced from respondent by the Eighth Judicial District Court of Clark County, Nevada on September 8, 1941, and that, in view of the decision of the Supreme Court of the United States in *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, he was no longer required to concede that under the rule of *Haddock v. Haddock*, 201 U. S. 562, his marriage to respondent remained undissolved in Pennsylvania.

The modified order of December 8, 1942 (R. 9) was the first and only order of support entered by the said County Court after petitioner's Nevada divorce. Said order had been entered on his petition praying for a remission of arrearages and for a reduction of the monthly rate of support. This procedure on petitioner's part, instituted after his Nevada divorce but prior to the decision of this Court in the *Williams* case, was in accordance with the then prevailing state of the law governing his marital situation, as

fixed by *Haddock v. Haddock*, 201 U. S. 562. Petitioner's prayer for relief had been granted in part by said order of December 8, 1942, to the extent that the arrearages were reduced to the sum of $1,000.00 and the monthly rate was reduced to $75.00. The payment of the said sum of $1,000.00 had been promptly made by petitioner (R. 33).

Thereafter and within a few weeks following the entry by this Court of its decision in *Williams v. North Carolina*, 317 U. S. 287 petitioner applied, as above set forth, to the said County Court for an entire vacation or revocation of the said amended support order of December 8, 1942. His application was refused and petitioner thereupon lodged three separate appeals, one from said order itself and two from orders refusing to open and to vacate the same. These appeals were docketed in the Superior Court of Pennsylvania on March 5, 1943 and became fully effective within the prescribed statutory period of three months after December 8, 1942. Judgments of affirmance were entered by the Superior Court (R. 51, 56). (See docket entries, R. 5.).

Appeals to the Supreme Court of Pennsylvania were specially allowed and taken from each one of the orders of affirmance as entered by the Superior Court. Stipulations were filed in two of the three cases in the Supreme Court providing for the entry therein of orders similar to that which should finally be entered in the one case which was then proceeded with in the Supreme Court (No. 5 March Term, 1944, R. 59).

At the original hearing in the said County Court petitioner rested his case for release from the support order substantially upon his divorce proceeding, properly authenticated (R. 34). Compliance was shown with the provisions of the Nevada law relating to substituted service (R. 35, 36). The court was also referred to the statutory

provision permitting the granting of an absolute divorce upon the ground of a living apart for three consecutive years without cohabitation (R. 36). This was the ground relied upon by petitioner. It is not a ground for divorce in Pennsylvania.

Relator wife in opposition to petitioner's case relied upon what was shown in the exemplification, namely, that petitioner had taken up a residence in Las Vegas, Nevada in June, 1941 and that he had been divorced there by a decree dated September 8, 1941. By reference to a deposition made by petitioner in support of his said application for remission of arrearages and other relief, it was then shown by relator that "some time" in October, 1941 petitioner was a resident of Cleveland, Ohio and had remained such to the time of trial (R. 42). Reference to the official Pennsylvania reports was also made to show that petitioner had twice been denied a divorce from the respondent in Pennsylvania, once in 1933 and again in 1940. Neither party testified in person.

The defence relied upon by the relator wife in the County Court was *res judicata* (R. 28, 48); that the Nevada court was bound by the previous refusals on two separate occasions of the Pennsylvania courts to dissolve the marriage relation. The County Court judge based his dismissal of the petition upon that single ground (R. 49). Counsel for petitioner had submitted petitioner's case to the County Court on the assumption that the issue of acquisition by petitioner of a domicil in Nevada had not been raised by relator and that the decree of the Nevada court was therefore presumptively valid, and would, for the purposes of this case, remain so until challenged by relator with proof sufficient to show lack of jurisdiction in the Nevada court.

When the case was heard on appeal in the Superior Court the judges of that court injected of their own motion the issue of acquisition of domicil over our protest that the issue had not been raised by the pleadings and had not been heard or passed upon by the trial court. Statements of counsel alleged to have been made during the oral argument in the Superior Court were seized upon and used by the opinion writer as evidence without previous notice to counsel of an intention on the part of the members of the court to proceed in that manner. In view, however, of the disposition of the judges, as manifested at the oral argument, to uphold the orders appealed from on the ground of lack of jurisdiction in the Nevada court, counsel for petitioner filed a supplemental brief on that point, in which it was contended that it could be fairly inferred that respondent's failure to challenge the Nevada's court finding in favor of jurisdiction was due to her inability to introduce any evidence militating against the finality of petitioner's removal from Pennsylvania and the *bona fides* of his claim of acquisition of domicil in Nevada, and that the promptness of his application for a divorce in the Nevada court, the shortness of time elapsed in the procuring of a decree and his early removal from Nevada to Ohio (after his remarriage) were not circumstances sufficient, in and of themselves, to warrant an assumption that a showing of such matters to the Nevada court would have resulted in a vacation by that court of its decree on the ground of lack of jurisdiction. If valid there, we contended that recognition of the decree by the Pennsylvania courts was commanded by the constitutional provision of full faith and credit.

The judges of the Superior Court were unanimous in rendering the decision of that court. Upon appeal, the jus-

tices of the Supreme Court divided, four for affirmance and two for reversal and for the granting of the relief originally prayed for, namely, vacation of the support order. As the dissenting opinion points out, all amounts of support money due up to, and, in fact, for some time beyond, the date of petitioner's Nevada divorce had been paid by petitioner.

In all the Pennsylvania courts it was admitted throughout that under the law of Pennsylvania the duty of a husband to pay support ceases with the severance of the marriage relation.

Neither the Superior Court nor the Supreme Court intimated that the affirmances were based on a theory of power in the Pennsylvania courts to enforce a condition of limited severance of the marital status; that is, to treat the foreign divorce as valid elsewhere than in Pennsylvania, as had been sanctioned by the result in *Haddock v. Haddock*. However, in subsequent opinions in similar cases the Superior Court has indicated that that was what the court intended to hold in the instant case. *Com. v. Phelps*, 154 Pa. Super. 270, 35 A. 2d 530; *Melnick v. Melnick*, 154 Super. 481, 36 A. 2d 235.

Specification of Errors.

1. The Courts below erred in failing to give full faith and credit to the decree of divorce obtained by petitioner in a court of record of the State of Nevada, which said decree, properly certified, petitioner had tendered as the basis of his claim for relief from a support order, entered by the Pennsylvania court in a desertion and non-support proceeding, commenced by the wife prior to the date of said Nevada divorce decree.

2. The Courts below erred in disregarding petitioner's Nevada divorce decree (on the ground of lack of jurisdiction in the Nevada court), in the absence of any competent evidence impeaching the finding of the Nevada court in favor of jurisdiction, or rebutting the presumption of validity to the benefit of which petitioner was entitled.

3. The Supreme Court of Pennsylvania erred in reciting in its opinion that the issue which was tried in the County Court and there found in favor of the wife was that the proceedings in Nevada were conceived and executed in fraud upon the states and courts of Nevada and Pennsylvania, whereas the only real issue or defence raised by the wife in the County Court was that of *res judicata* (R. 28, 50).

4. The Supreme Court of Pennsylvania erred in the conclusion set forth in its opinion to the effect that the Superior Court was justified in making "the natural or normal inference" that petitioner's proceeding in Nevada was a sham and fraud *for the purpose of evading the support order of the County Court* (R. 61), whereas the record showed that petitioner had fully complied with the support order and had made no attempt whatever to obtain relief therefrom until after the decision of this Court on December 21, 1942 in the *Williams* case (R. 67).

5. The Supreme Court of Pennsylvania erred in concluding that the inferences of fact to be drawn from the contents of the entire record of the Nevada proceeding, together with the facts alleged to have been admitted in the argument before the Superior Court, clearly showed that the jurisdictional fact of a Nevada domicil was lacking, whereas the evidence in the Nevada record fully supported the decree of the Nevada court, and the alleged facts, de-

scribed as formally admitted in the quotation made from the opinion of the Superior Court (R. 60), were not only irrelevant but were also not in fact stipulated as agreed facts by counsel and were used by the Superior Court, without notice to or confirmation by counsel, in support of its decision on the issue of jurisdiction, which said issue had been injected into the case by the Superior Court of its own motion.

6. The Supreme Court of Pennsylvania erred in inferring that petitioner harbored on the date of the trial of his case in Nevada, which was also the date of his decree, an intention of leaving the State of Nevada immediately afterward and that his Nevada case was no different in legal effect from what it would have been if he had never been in that State but had arranged to have someone falsely impersonate him at the hearing, and in placing upon petitioner the burden of producing evidence to rebut the foregoing inferences made against him by the Supreme Court (R. 61).

ARGUMENT.

This case does not involve the duty to pay alimony.

In the courts below petitioner sought a release from an order which had been entered in a criminal, or at least a quasi-criminal, proceeding commenced by an information made by the relator wife, praying for the issuance of a warrant for petitioner's arrest (R. 32). In Allegheny County the County Court exercises in such cases the jurisdiction of the Court of Quarter Sessions. The legislation authorizing this type of proceeding is a part of the Criminal Code of the State of Pennsylvania, Act of April 13, 1867, P. L. 78, § 2, 18 P. S. § 1252; as amended by Act of June 24, 1939, P. L. 872, § 733, 18 P. S. § 4733.

It is the law of Pennsylvania that maintenance of a proceeding of this kind presupposes the existence of the marriage relation. When an order has been entered in a proper case, such order automatically loses its validity upon the cessation or dissolution of that relation. In *Commonwealth v. Kuraiker*, 96 Pa. Super. Ct. 553, 1929 the rule was stated thus by Judge Trexler: "When the marriage relation ceased to exist, the order of the court was properly vacated because there was no duty on the husband to pay to this woman's support when she ceased to be his wife."

The only qualification upon the husband's right to a vacation of the support order is that he pay all installments which accrue under the order down to the date of his divorce decree. *Commonwealth v. Parker*, 59 Pa. Super. Ct. 74 (a Nevada decree case). Admittedly petitioner has complied with this requirement. His payments actually extend beyond the date of his decree.

Petitioner's proceeding below was filed in reliance upon the decision of this Court in the Williams case.

We wish to stress at the outset of this brief certain features of petitioner's case which could not very well be indicated in the foregoing Concise Statement of the Case.

Before petitioner arrived in Nevada in the summer of 1941, he had severed completely his ties, social and business, with Pennsylvania. It is true that in the latter state he had twice unsuccessfully sought to be divorced. He had, however, complied without objection with the terms of the support order made at the wife's instance by the Pennsylvania domestic relations court (County Court). He must be presumed to have known that under the rule of *Haddock v. Haddock* a Nevada divorce would not release him from the terms of that order within the limits of the State of Pennsylvania. On the other hand, he was entitled to believe that upon the strength of the rule of the *Haddock* case, it was open to him to apply for and receive a Nevada divorce that would permit him to remarry and live in domestic peace in Nevada and in any other state of the Union except Pennsylvania. He acted upon that belief and made no effort to seek an invalidation of the support order.

However, after the decision of this Court in the *Williams* case, he followed the advice of counsel to the effect that with the overruling of the *Haddock* case he was justified in applying for a vacation of the support order. To his surprise he learned very quickly that the Pennsylvania courts took the position that as far as this petitioner was concerned, the overruling of *Haddock v. Haddock* was an apparently immaterial circumstance. His Nevada divorce was by those courts regarded as entirely nugatory in Pennsylvania, but erroneously on grounds which were held to have been always available to courts of the matrimonial

domicil without reliance or dependence upon *Haddock v. Haddock* and as specifically sanctioned by *Bell v. Bell*, 181 U. S. 175, 21 S. Ct. 551.

We consider *Haddock v. Haddock* to have been a decision intended to furnish a workable rule with respect to the effect to be given in the matrimonial domicil to a divorce obtained in the court of a sister state upon substituted service. As the instant case came clearly within the scope of that decision as so interpreted, we experience considerable difficulty in attempting to surmise the views of the Pennsylvania judges and justices, who participated in the decisions below in this case, as to what this Court intended to accomplish by the overruling of *Haddock v. Haddock*, or as to what the occasion was for the concern so clearly manifested by the dissenting members of this Court in the *Williams* case. This difficulty is resolved to some extent by the observations of Kenworthey, *J.*, (R. 52), where it is intimated that Mr. Justice Jackson did not correctly grasp what this Court did in the *Williams* case. It would seem, indeed, that the decision below is a deliberate attempt to circumvent the result in the *Williams* case by means of an unsound and unwarranted use of the decision in the case of *Bell v. Bell*.

We contend that the decision below ignores completely the distinction between the faith and credit required to be given judgments of the courts of sister states and that to which local common and statutory law is entitled, a distinction which this Court pointed out in the *Williams* case, and applied more recently in *Magnolia Petroleum Co. v. Hunt*, 319 U. S. 734, 64 S. Ct. 208, citing the *Williams* case.

It would, therefore, appear to be in order to charge the courts below with having evaded "the constitutional issue in this case on the easy assumption that petitioner's domicil in Nevada was a sham and a fraud." 317 U. S. 292, 63 S. Ct. 210.

The decision below is not in conformity with the principles established by the Williams case.

Were the courts of Pennsylvania correct in reasoning that although *Haddock v. Haddock* has been overruled, the case of *Bell v. Bell*, 181 U. S. 175 still stands as an authoritative precedent and as such required the entry of the judgment now brought here for review?

We believe and respectfully urge that the Pennsylvania state courts misconceived the real result reached in *Bell v. Bell*. They failed to see the radical difference between the factual situation there and that which is disclosed by the record in the present case.

In *Bell v. Bell* this Court permitted the New York court to deny validity to the Pennsylvania decree presumably because it appeared that the New York court had been convinced by evidence submitted to it that the husband had not been in fact a resident of Pennsylvania for the required period of time before the institution of his action there, and that his representation to the contrary to the Pennsylvania court had been false. Admittedly the wife had never been a resident of Pennsylvania. She was served only by publication. Admittedly Bell had sworn falsely, either in Pennsylvania or in New York, as to his residence. Furthermore, he had seen fit to offer no evidence in defense of his wife's suit in New York to show that he had actually changed his residence from New York to Pennsylvania. He apparently chose to stand upon the conclusive effect of his Pennsylvania decree. Until the real facts as to his residence had been developed in the New York case, it seems doubtful whether the mere offer of the New York affidavit should have been held enough to overcome the presumptive validity of the Pennsylvania decree. The New York court's grant of a divorce to the wife on the ground of adultery

was a result entirely consistent with the rule later announced in *Haddock v. Haddock*, and was actually the same as the ruling of the New York divorce court passed upon and considered in the case of *In Re Holmes Est.*, 219 N. Y. 261, 52 N. E. 2d 424. The actual result in the *Holmes* case leads us to believe that the effect of the *Bell* case decision was to leave the Pennsylvania decree valid in Pennsylvania, in accordance with the principle later announced in *Haddock v. Haddock*. But with the overruling of *Haddock v. Haddock*, even the New York courts would now, in the purely suppositious event of the death of either Bell or his second wife at this time in New York, grant letters of administration to the survivor on the ground of the validity of their marriage contracted upon the strength of Bell's Pennsylvania divorce.

It would appear that the basic reasoning of *Bell v. Bell* must be that the Pennsylvania court, which granted Bell a divorce, would have been required (*i. e.* by this Court) to vacate its decree upon the showing to it, in the first instance, of the case which had been presented to the New York court, and that because the Pennsylvania court would presumably have done so, if the question had been first presented to it, the New York court was justified in ignoring the Pennsylvania decree. Whether upon this view the Pennsylvania court would have later been obliged to give full faith and credit to the New York decree, upon the theory suggested by the result in *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 51 S. Ct. 517, is a matter of conjecture.

When, in the opinion in the *Williams* case, this Court said that because that case had not been tried and submitted on the issue of domicil alone, this Court had no occasion then to meet the problem which would have been presented

under *Bell v. Bell*, and that because that issue did not have to be met, no opinion on it was being intimated (317 U. S. 292, 63 S. Ct. 210), we believe that what this Court then intended to suggest was that the prosecution in the *Williams* case might on a second trial be able to offer evidence of such gravity (*e. g.* like the affidavit in the *Bell v. Bell* case) as to require the Nevada court itself, if the same evidence were offered there, to set aside its own decree. The clear intimation seems to us to inhere in this Court's language that unless such evidence, if produced, would be deemed sufficient for that purpose in Nevada, it would be equally ineffective in the North Carolina court upon the retrial. And over and above all that, we believe that this Court was thereby leaving open an occasion for a reconsideration of *Bell v. Bell* and the somewhat similar cases of *Streitwolf v. Streitwolf*, 181 U. S. 179 and *Andrews v. Andrews*, 188 U. S. 14.

It does not seem unreasonable in such situations to require the absent spouse to apply to the divorce court for relief from an adverse decree, alleged to have been improperly obtained, or better still, to conform to a new public policy, which would require the absent spouse to come into the foreign court in the first place to challenge the right of the libellant to proceed there for the relief prayed for. The latter alternative was resorted to by the wife in *Andrews v. Andrews*, 188 U. S. 14, and in *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3. It is reasonable to suppose that all courts would compel suitors to defray the expenses and counsel fees of the absent spouses. The magic of the so-called matrimonial domicil, which Mr. Justice Holmes tried so hard to dispel in his dissent in *Haddock v. Haddock* and which is now specifically discarded by this Court (317 U. S. 301), would then disappear entirely and the spouse remaining in the matrimonial domicil, so-called, who has

been heretofore the beneficiary of the rule of *Haddock v. Haddock*, would be obliged to realize, when now served with actual notice of a pending divorce case, that if he or she should elect not to defend the case, and the foreign court should proceed to the entry of a decree on the basis of its own jurisprudence as to what are the requirements of jurisdiction and the grounds for divorce, a decree so entered will be final in every state of the Union. Such a policy should not permit the non-appearing absent party to relitigate in the domestic forum the issue of domicil.

Even under Bell v. Bell the courts below were not warranted in denying full faith and credit to petitioner's divorce decree and in placing upon petitioner the burden of going forward with evidence in support of his claim of domicil.

a. *The Condition of the Record on the Subject of Domicil.*

The fact situation with respect to petitioner's removal to and residence in Nevada, as furnishing a ground for the denial of full faith and credit to petitioner's decree, was first adverted to upon the argument of the appeal of this case to the Superior Court. Accordingly, the record upon that subject is in an unusual condition. The chief responsibility for that situation is in our opinion assignable to the failure of counsel for respondent to rely in the trial court upon the defense of lack of acquisition of a domicil in Nevada. As already stated, petitioner relied upon the presumption of validity.

We feel justified in asserting that the failure of respondent to rely upon and to assume the burden of sustaining the defense of lack of domicil was due to the non-existence of any facts tending to prove that defense. The offer of

evidence with respect to petitioner's prompt transfer of residence to Cleveland was made by respondent apparently for the purpose of supporting the pleaded charge of fraud in not disclosing to the Nevada court petitioner's two previous unsuccessful attempts to procure a divorce in Pennsylvania. The contention of counsel seemed to be that the Nevada court would have been obliged to treat such denial of his right to a divorce as *res judicata*. The trial court decided the case on that theory. Had the case been tried on the issue of domicil, petitioner could have shown many facts, not in this record, which would have supported his position. In the absence of any indication from respondent that she could have shown additional facts negativing the existence of domicil, she must be held to have rested her challenge of the validity of the Nevada court decree upon the meagre showing in the record of an alleged suppression of information concerning the prior Pennsylvania divorce litigation. On appeal, it was contended for respondent that the trial court had correctly decided the case on this theory of *res judicata*.

Had respondent's claim of fraud related to lack of acquisition of domicil, the supporting facts should have been pleaded, for under the often cited Pennsylvania authority of *Commonwealth v. Cronhardt*, 127 Pa. Super. 501 and 135 Pa. Super. 117, the burden was clearly upon respondent to establish the facts negativing the jurisdiction of the Nevada court. Petitioner was fully justified in relying upon the presumption of validity. In the *Cronhardt* case the foreign decree was based upon substituted service and yet it was deemed to be presumptively valid.

In *Hammell v. Britton*, 19 Cal. 2d 72, 82, 1941; 119 P. 2d 332, 338, it is said:

> "• • • There are no allegations of the facts constituting the fraud. It is elementary that in an action for

equitable relief based upon extrinsic fraud in obtaining judgment, the facts constituting the fraud must be pleaded with particularity and specifically * * *."

b. *Treatment of the Case by the Pennsylvania Superior Court.*

The facts of the instant case did not warrant the summary assumption by the two Pennsylvania appellate courts (Superior and Supreme) of the right to regard petitioner's claim of domicil in Nevada as a fraud and a sham. The facts relating to domicil were not fully developed, because the issue of acquisition of domicil was not raised in the County Court. The case was disposed of by the judge of that court upon the ground of *res judicata* (R. 50). The untenability of this ground was specifically ruled by the Superior Court (R. 56). That court, however, undertook to pass upon the questions of jurisdiction and domicil. These questions were raised by the court itself, presumably because they afforded a simple means of affirming the order of the trial court. It is true that these questions were orally discussed at the argument (R. 54, foot-note), but the discussion was precipitated by comments from the members of the court, who intimated that the record itself of the Nevada proceeding contained enough to show that petitioner had committed a fraud on the Nevada court with respect to the nature of his residence in that state, and that petitioner's claim of a bona fide domicil was nothing but a sham. The views expressed from the bench were entirely consistent with and remarkably similar to those contained in the dissenting opinion of Mr. Justice Jackson in the *Williams* case.

The opinion writer of the Pennsylvania Superior Court reasoned that this Court had in the *Williams* case reaffirmed *Bell v. Bell*, for otherwise "if the court had been of opinion that mere residence for the required period would

support a valid decree it would have directed that defendants be discharged" (R. 53). Presumptive validity of petitioner's Nevada decree was conceded, but "until the Supreme Court of the United States gives us a different test of domicil" (R. 55), the right was asserted to apply their own test to what were assumed to be the facts of this case concerning domicil. And it was then held that petitioner had not established "a bona fide domicil in the absence of proof of other circumstances which, under our decisions, are regarded as essentials of domicil" (R. 55). No comment was made on the very apparent variances between the facts of petitioner's case and those of the petitioners in the *Williams* case, a variance which would seem to us to be distinctly in favor of the petitioner here. Nor was any inquiry made as to the *res judicata* quality in Nevada of petitioner's decree. No acknowledgement or recognition was made of the manifest incongruity of permitting a re-examination in the domestic forum, and according to the rules of local jurisprudence, of a subject which had been before the foreign court for determination in the first instance, and where, under our federal system, the foreign court was well within the limits of due process in deciding that matter in accordance with its own established jurisprudence relating thereto. Patently, therefore, the Superior Court flouted the full faith and credit provision by undertaking to brand petitioner's domicil as a fraud and a sham.

c. *Treatment of the Case by the Pennsylvania Supreme Court.*

As we read the opinion of the Supreme Court of Pennsylvania the reasoning of the Superior Court was not followed (R. 59). A new method of upholding the decision of the County Court was evolved. This new approach

seems to us to place an undue and unfair emphasis upon questionable points of procedure. It was reasoned that if petitioner had tendered an exemplification of nothing but his decree, he would have been entitled to prevail, but having opened up the issue of acquisition of domicil by offering an exemplification of the whole proceeding in Nevada; he thereby brought the facts of his alleged Nevada domicil under review by the Pennsylvania courts. It was further held that the facts shown by the Nevada record, together with those appearing in the record of the desertion proceeding itself, and particularly in a deposition given by petitioner in support of his application for a reduction of the support order, raised a presumption of invalidity against petitioner which it then became his duty to overcome. It was suggested in particular that he should have undertaken to explain the conditions which developed immediately after his Nevada divorce, "which made it desirable that he should again change his domicil from Nevada to some other state" (R. 61).

This treatment of petitioner's case by the Pennsylvania Supreme Court tends to distinguish it from the situation in the second *Williams* case, being submitted concurrently with the instant case. We shall now attempt to point out what we believe to be error in the reasoning of the Pennsylvania Supreme Court.

The Supreme Court of Pennsylvania placed its decision upon what we regard as an untenable position when it held that if petitioner had presented to the County Court nothing but a duly certified copy of his divorce decree, his wife would then have been required to produce evidence to overcome the "*prima facie* effect" of the decree (R. 60).

Several misconceptions inhere in the foregoing statement. The full faith and credit provision relates to "pub-

lic Acts, Records, and Judicial Proceedings", not to judgments or decrees as such. The constitutional provision requires the rendering of *full* faith and credit, not a mere *prima facie* effect. If the finding of jurisdiction is upheld by the certified record, the burden is on the opposite party to sustain the plea of lack of jurisdiction. The presumption of validity applies in divorce cases even where jurisdiction rests upon substituted service.

In *Freeman on Judgments*, 5th Ed. § 1030, page 2149, it is said:

> "An incomplete record of a suit for divorce is not admissible, either to prove a divorce by a court of competent jurisdiction, or that a party thereto 'in good faith believed she had been divorced', though the rule is otherwise where the decree is offered merely to corroborate a witness and not an as estoppel."

See also *Shilling v. Seigle*, 207 Pa. 381, 1904, that an exemplification of an Ohio judgment offered by plaintiff will be presumed to be a full copy of the entire record where the clerk certifies that it is a full and complete transcript of the proceedings had in the case; and *Christine v. Whitehill*, 16 S. & R., 98, 106, 1827, where it is indicated that a clerk's certificate of a Pennsylvania Orphans' Court proceeding should conclude with the statement that the copy of the records is "so full and entire as in his office they remained."

The offer of an exemplification of the mere divorce decree as such would have been subject to objection. On the other hand, the entire proceedings, being those of a court of general jurisdiction and certified as here pursuant to the Act of Congress, required the Pennsylvania court to treat the decree, which was regular on its face, as presumptively valid, for concededly the evidence in the record was sufficient both to sustain the jurisdiction of the court and the truth of the charge or ground for divorce

relied upon. See cases cited in the dissenting opinion of Mr. Justice Drew (R. 65). It is the "judicial proceeding", authenticated as directed, which is entitled to full faith and credit (R. S. § 905, 28 U. S. C. A. § 687). When so authenticated, it has not merely a "*prima facie* effect". The court in which it is offered is subject to the command of the constitutional provision and of the statute cited to accord it *full* faith and credit, by which is implied such faith and credit as would be given it in the courts of the State in which it was rendered. The true inquiry was, therefore, not what the Pennsylvania court thought about the *bona fides* of petitioner's claim of acquisition of domicil, but whether the wife had produced any evidence which would have required the Nevada court to invalidate its decree on the ground of lack of jurisdiction. Admittedly she had not. Instead she offered a part of petitioner's evidence in the Nevada court. See comments of Drew, J. (R. 65). Petitioner was therefore fully entitled to the benefits of the presumption of the validity of his divorce decree.

In the case of *Estate of Weichers*, 199 Cal. 523, 250 P. 397, 1926; certiorari denied *Weichers v. Weichers*, 273 U. S. 762, 47 S. Ct. 476, where a woman attempted to claim a widow's share of the estate of a California decedent, her claim was dismissed in favor of a woman whom the decedent had married after obtaining a divorce from claimant in an Ohio court upon the basis of substituted service of process. It was contended by claimant that the certified record showed lack of jurisdiction in the Ohio court to enter a valid decree. It was said by Finch, J.: "The presumption is the same where service has been made by publication as where personal service had been had. *McHatton v. Rhodes*, 143 Cal. 275, 279."

It is possible that his Honor, Mr. Justice Linn, in making the distinction between the whole record and the decree

as such had in mind the principle of law that if the certified record shows on the face of it lack of jurisdiction, the domestic court may regard the judgment as what it is, *i. e.*, a nullity. In such a case the defendant need not go forward with evidence to show lack of jurisdiction. It was so held in *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1118 (1879). Admittedly this principle has no application to the instant case. Nowhere was it suggested in the opinions of the courts below that the Nevada court lacked jurisdiction on the basis of the certified record which petitioner offered in evidence. The decree was therefore presumptively valid. Mr. Justice Linn was, however, of opinion that the evidence set forth in the record, coupled with the additional circumstances referred to, namely residence by petitioner in a hotel during his stay in Nevada and a removal described as immediate to Ohio after obtaining his decree, was enough to justify a denial by the Pennsylvania intermediate appellate court, *of its own motion*, of full faith and credit to petitioner's Nevada decree. In this we believe there was palpable error.

Had the wife offered any testimony to challenge petitioner's claim of acquisition of a Nevada domicil, petitioner could then have shown why he removed so soon from Nevada to Ohio. Until afforded an opportunity to do so in an orderly way, and only when obliged to do so, he could have shown the "conditions [which] developed immediately afterward" (R. 64), which caused him to remove to Ohio when he did. He was improperly characterized by the Pennsylvania court as having misled the Nevada court as to his domiciliary intent (R. 62).

It was also reasoned below that if petitioner had supplemented his testimony before the Nevada court "by the fact that he would leave the state immediately afterward,

the court *would have been justified* in declining to make a finding that his Nevada domicil was bona fide" (R. 61) (Italics ours). This reasoning is in our opinion erroneous. Its error vitiates the entire case of the majority justices of the court. The inquiry is directed to an irrelevant matter, namely, what the Nevada court might have been *justified* in doing. Without quarreling with the use by the court of the word "immediately", because the record shows that petitioner had left Nevada and was living in Cleveland within the comparatively short time of six or seven weeks, we contend that that fact does not require the inference that he intended to leave at the time he testified on September 8, 1941. Certainly it does not require that the Nevada court should have held that he did so intend at the time he testified, or that this Court would convict the Nevada court of error is not so holding. In our opinion the words "would have been justified in declining to make a finding that his Nevada domicil was bona fide" mean little more than that the court "might have" so found. And if the court "might have" so found, then conceded it might not have so found. Its action in finding as it did is not subject to collateral attack in a proceeding in the courts of another state. Petitioner's act in leaving when he did was not inconsistent with his testimony. The Pennsylvania court was without justification in imputing to petitioner an intention to mislead the Nevada court.

The decision of this Court in *German Savings & Loan Society v. Dormitzer*, 192 U. S. 125, 24 S. Ct. 221, 1904, may be authority for the action of the Pennsylvania appellate courts in treating the matter of jurisdiction as being in issue, when it had not been pleaded, but it is also authority for upholding our contention that the disposition made of this case by the Supreme Court of Pennsylvania as outlined above was a clear evasion of the Con-

stitution. In the *Dormitzer* case the facts which were held to be sufficient to warrant the Washington court in ignoring the Kansas court's divorce decree were strikingly like those which would have been fully developed had the relator wife attempted here to disprove petitioner's Nevada domicil, and such facts, if proven here, would have strengthened petitioner's case instead of weakening it. It is as if the husband in the *Dormitzer* case had been divorced in Washington and later had become involved in litigation in Kansas in which the supposed Washington divorce would have been challenged on the ground that he had never acquired a domicil in Washington. In the instant case the Pennsylvania Supreme Court ignored record facts relating to the finality of petitioner's departure from Pennsylvania which are strikingly similar to those developed in the *Dormitzer* case. These facts are, however, stressed in the dissenting opinion below (R. 66). If in the *Dormitzer* case such facts were sufficient to oust the Kansas court of jurisdiction, so, contrariwise, they should be sufficient, in the present case, to uphold the jurisdiction of the Nevada court. The contingency discussed by Mr. Justice Holmes in the *Dormitzer* case is exactly what has occurred in the present case. We quote:

> "It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warrant an inference. . . ."

The decision below in the *Dormitzer* case, invalidating the Kansas divorce, was affirmed only because the record disclosed that there was evidence to support the state court's finding that the husband had changed his domicil to Spokane about two months before filing his libel for divorce in

Kansas. In the instant case, the record discloses no such evidence and no such finding.

"d. *The Pennsylvania Appellate Courts Undertook to Deny the Jurisdiction of the Nevada Court without Evidence Impeaching It. Such an Evasion of the Constitution will not be Upheld.*"

The outstanding circumstance in this record in favor of petitioner on this question of jurisdiction is his departure from Pennsylvania in the summer of 1941, never to return. Manifestly he has lost his Pennsylvania domicil. He has effectively established a domicil at the present time in Ohio. His contention is that after giving up his Pennsylvania domicil, he acquired and maintained a domicil in Nevada. The court of that state has decided with all due formality and compliance with due process of law that he did so acquire a domicil in that state. How then could the Pennsylvania courts fail to give full faith and credit to the decree of the Nevada court?

The record of the Nevada proceeding is self-sustaining on the question of jurisdiction. What facts are alleged below to overcome the presumption of validity? Only three facts are stressed: (1) that petitioner, who had arrived in Nevada in June, 1941, lived in a hotel during his stay there, (2) that petitioner left Nevada immediately after obtaining his divorce on September 8, 1941, and (3) that he had established a residence in Cleveland, Ohio, in the latter part of October, 1941.

We are at a loss to understand the action of the courts below in emphasizing the fact of residence in a hotel. Notoriously, hotels are frequented by guests who may be either transients or permanent guests. We believe this court will take judicial notice of the circumstance that

many persons live in hotels who are unquestionably domiciliaries of the state where the hotel is located. That petitioner was assumed by the courts below to have lived in a hotel while in Nevada is, therefore, in our opinion of no significance whatever in justifying or supporting the result reached below.

In the second place, the promptness of petitioner's removal from Nevada is also a wholly immaterial circumstance so far as furnishing any support for an attack upon the Nevada court's finding in favor of domicil. By definition a domicil of choice implies the right to commence or to terminate a person's domicil at will, at any time and for any reason.

And finally, how the fact that petitioner had established a residence in Cleveland in October, 1941 could have any relevancy on the issue of a Nevada domicil is more than we can understand.

We are constrained, therefore, to believe that both Pennsylvania appellate courts, in grasping at such flimsy grounds for upholding the decision of the trial court, which had been based upon an admittedly unsound reason, thereby clearly disclosed their aversion to the new rule of law as announced by this Court in the *Williams* case.

This attitude of the Pennsylvania Supreme Court is not surprising in view of the history of the prior disposition of this question by that court. As early as 1838 in the case of *Dorsey v. Dorsey*, 7 Watts 350, Chief Justice Gibson wrote an elaborate opinion affirming the action of a trial court which had refused to entertain a libel filed by a woman, who had married and lived with her husband in Pennsylvania, but had later gone with her husband to live in Ohio. Upon her return to Pennsylvania she charged her husband with desertion in Ohio. "The appellant's

case, therefore, appertains to the authorities in Ohio. The forum is there, and the law which declares the offense is there * * * the person of the transgressor was not subject to our jurisdiction at the time of the fact; for an attempt to bind him without it, or without hearing or notice, would be extravagant." And with respect to the full faith and credit provision upon the ultra-territorial force of a sentence of divorce by a court of competent jurisdiction, the learned Chief Justice said "* * * nothing in the federal constitution or laws has been thought to touch the question of jurisdiction, and the members of the union therefore stand towards each other, in relation to it, as strangers."

The foregoing decision was interpreted by Mr. Justice Agnew in 1867 in the case of *Colvin v. Reed*, 55 Pa. 375, as holding "that jurisdiction depends on the real domicil of the parties at the time and place of the injury." It was held that a Pennsylvania wife was not ousted of her dower rights in Pennsylvania real estate by a divorce obtained on substituted service by the husband in an Iowa court upon the charge of desertion by the wife in Pennsylvania. As the wife had never appeared, it was held that she could not be affected by the actions of the husband in taking up a new domicil in Iowa and in obtaining a divorce there.

We are not aware that the Pennsylvania Supreme Court was obliged to consider whether and to what extent the principles announced in the foregoing two cases were affected by the ruling of this Court in 1901 in *Atherton v. Atherton*, 181 U. S. 155. Such an examination was rendered unnecessary by the ruling made shortly thereafter in 1906 by this Court in *Haddock v. Haddock*, on the strength of which, the minority states, including Pennsylvania, "* * * took new courage and (except in a few minor par-

ticulars; where the Haddock decision had wrought a change) continued to follow their old view." Beale, Haddock Revisited, 39 H. L. R. 419.

It is our position that the Pennsylvania Supreme Court was, therefore, quite naturally disposed to limit as far as possible the consequences resulting from the overruling of *Haddock v. Haddock*. The opinion of the majority shows a clear, although unacknowledged, preference for the views theretofore expressed in the early Pennsylvania cases above referred to.

We contend that under the principles firmly established by the *Williams* case, it was petitioner's clear privilege to take up a residence in Nevada. His place of abode there became his domicil. "The place where a man lives is properly taken to be his domicil until facts adduced establish the contrary." Jackson, J., *District of Columbia v. Murphy*, 314 U. S. 441, 455 (1941).

We contend that the finding of the Nevada court in favor of domicil was not only right, but that it was based on due process, and was not subject to collateral attack, except on grounds that would invalidate it upon direct attack in Nevada as being entirely void and not merely voidable. No such grounds are shown in the record of this case. The language quoted by Mr. Justice Holmes in his dissent in *Haddock v. Haddock* from *Christmas v. Russell*, 5 Wall. 290 is, therefore, applicable here. "If the judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere." This follows, he says, because there is no exception in the words of the Constitution.

Section 113 of the Restatement of Conflict of Laws reflects in part the revised views of Beale (cf. Haddock Revisited, 39 H. L. R. 417, 1926). Section 113 (a) (ii) ex-

presses the forced emphasis upon the element of fault, as elaborated by Beale in the article cited.* In developing this element of fault, Beale was obliged to argue that the actual judgment in *Haddock v. Haddock* was inconsistent with the husband's having been validly divorced at his domicil (39 H. L. R. at page 420). With the overruling of the *Haddock* case, "the hopeless refinements introduced by that case," including presumably the emphasis placed upon this element of fault, must be treated as no longer of any weight. Beale is dead. Our conjecture is that if he had lived, he would have been willing to revise his views once more and to express his approval of the position taken in the concurring opinion of Mr. Justice Frankfurter in the *Williams* case. The provisions of the Restatement must accordingly be considered as no longer authoritative, particularly in the light of the following statements by Mr. Justice Frankfurter (317 U. S. 307, 63 S. Ct. 217):

> "* * * It is indisputable that the Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered." (And as we read the context, the meaning is that it was immaterial whether the North Carolina court had or had not seen fit, in disposing of the case, to regard the Nevada decrees as "a fraud and a sham.")
>
> "* * * Freed from the hopeless refinements introduced by that case (*Haddock*), the question before us is simply whether the Nevada decrees were rendered under circumstances that would make them binding against the absent spouses in the state where they were rendered. * * *"

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* "§113. State of Domicil of One Spouse.

A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state * * *

(ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; * * *"

In the instant case no question has been raised as to the validity of service in our Nevada proceeding. Nor could it have been, even under Section 109 of the Restatement of Conflicts. Service having been made in accordance with the provisions of the Nevada Statutes (R. 35, 36), the decree was as binding upon respondent "* * * as if she had been served with notice in Kentucky [Nevada], or had voluntarily appeared in the suit." Gray, J., in *Atherton v. Atherton*, 181 U. S. 155, 21 S. Ct. 544 at 550.

Returning again to the question of petitioner's acquisition of a Nevada domicil and his testimony with respect to his assumption of a permanent residence in Nevada, we wish to quote the following language of Chief Justice Sterrett in *Price v. Price*, 156 Pa. 617, 1893 (cited with approval of Mr. Justice Day in *Gilbert v. David*, 235 U. S. 561) at page 626:

> "* * * This (domicile of choice) is acquired by actual residence coupled with the intention to reside in a given place or country, and cannot be acquired in any other way. For that purpose, residence need not be of long duration. If the intention of permanently residing in a particular place exists, a residence in pursuance of that intention, however short, will establish a domicile. The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely. * * *"

We contend, therefore, that petitioner was justified in stating, and the Nevada court was warranted in finding (and free from collateral attack), that his new residence in Nevada was presumptively "permanent" in the sense assigned to the word by Chief Justice Sterrett in the foregoing quotation. (See quotations from Holmes, J., *infra*, in *Williamson v. Osenton*.) With respect to Clark County, Nevada, "It was his place of abode, which he had no pres-

ent intention of changing; that is the essence of domicile", Mr. Justice Day in *Gilbert v. David, supra.* He was telling both the "literal truth" (Holmes, J., in *Williamson v. Osenton*, 232 U. S. 619) and the actual truth, in the only relevant sense in which the Nevada court was interested in knowing about the nature of his stay; namely, that he was there for a residence of indefinite duration, and had abandoned all intention of returning to his former domicil. Had he been interrogated as to his intention with respect to returning to Pennsylvania, he undoubtedly would have explained the complete severance by him of his former business and social ties in that state (R. 6). He had burned his bridges behind him, as shown by the admitted fact of his failure to return. Deciding to come East, rather than to remain in Nevada or to go West, he settled in Cleveland.

It seems to us that both the Superior and the Supreme Courts of Pennsylvania insisted upon ascribing to the word "permanent" the denotation or meaning of "everlasting" or "forever". In Crabb on English Synonyms it is stated under the heading, "Durable, Lasting, Permanent":

> "DURABLE is said of things that are intended to remain a shorter time than that which is LASTING: and PERMANENT expresses less than *durable* * * *".

In Merriam-Webster's Dictionary of Synonyms under a heading which lists: "Lasting, permanent, perdurable, durable, stable, perpetual", it is said in part:

> "* * * Lasting usually implies long continuance with no end in sight: in this sense, it may be equivalent to *everlasting* * * *. More often, however, it does not imply endlessness, but rather a surprising capacity to continue indefinitely * * *. *Permanent* applies chiefly to things which are not temporary * * * but which continue or are likely to continue indefinitely: as, a *permanent* position; a *permanent* arrangement; * * *."

The Nevada court was therefore, not misled by petitioner. That court was entirely free to place its own construction upon the sense or meaning in which the word "permanent" was used by counsel in the questions addressed to petitioner. That the word actually had the connotation of "indefinite permanent abode" in Nevada is indicated by the statement of Mr. Justice Jackson at page 224 (63 S. Ct.): "If Nevada may prescribe six weeks of indefinite permanent abode in a motor court as constituting domicile, she may as readily prescribe six days." The Nevada court was similarly free, in making its own finding, to use the word in the sense of "for an indefinite time", for it must be assumed that the court was familiar with the general fact situation as to the residence of petitioner in Nevada. The Nevada court was, therefore, fully justified in finding the existence of an actual *animus manendi*, accompanied by a physical transfer of residence.

A further development of the fact situation would have, in our opinion, only confirmed the Nevada trial judge in the correctness of his finding of domicil. How can it be argued here that his finding is not binding in Nevada on the absent spouse? If binding there, it is binding on her everywhere in the Union.

> . . . . Manifestly the question whether or not the plaintiff in the action had resided in the State of Nevada for a sufficient length of time to bring his case within the operation of the statutes of that state was a question to be adjudicated by that court. This necessarily follows if the provision of the Federal Constitution is to be given its due weight. . . . . per Heid, J. at page 82, *Commonwealth v. Parker*, 59 Pa. Super. Ct. 74, 1915.

We are inclined to think that under the particular facts of petitioner's case he has a better standing to ask for the according of full faith and credit to his decree than do

the great majority of recipients of Nevada divorces, and, that if the *Williams* case means nothing to him, no such recipient can benefit from the handing down of that decision. Surely both the majority and the minority of the justices of this Court will be surprised to find that the *Williams* decision has been so construed. Why, for instance, were the minority justices so vigorous in their dissents, if the way was being left open for such easy invalidation of Nevada decrees as was accomplished by the decision of the Pennsylvania courts in this case?

Had the question of petitioner's domicil been put in issue in the Nevada court, the gist of the inquiry so raised would, it seems to us, have been whether petitioner still retained his previous Pennsylvania domicil. In determining that question the Nevada court would have been properly guided by the rules of law relating to domicil which have been quite recently summarized by Mr. Justice Jackson in the above cited case of *District of Columbia v. Murphy*, 314 U. S. 441, where the question involved related to the retention by government employees working in Washington of domicil in their home states. As there stated (p. 456):

> "In order to retain his former domicile, one who comes to the District to enter Government service must always have a *fixed and definite intent to return* and take up his home there when separated from the service * * *." (Italics ours.)

In view of the admitted circumstance in this case that petitioner severed once and for all his connection with his former Pennsylvania domicil, it is eminently proper for us to stress this point, because as was said by Mr. Justice Jackson in the *Murphy* case at page 457:

> "All facts which go to show the relations retained to one's former place of abode are relevant in determining domicile. What bridges have been kept and what have been burned * * *?"

Previously the learned Justice had said, p. 454, "On the other hand, we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled." That language applies exactly to the situation petitioner found himself in while he resided in Nevada. Had domicil entailed obligations to Nevada, he would have been required to acknowledge them.

Or looked at in the light of the broad rules which furnish "a divining rod in locating domicile" (see note 10, p. 455 of the *Murphy* case), where was petitioner's "home" from June to October of 1941, if not in Las Vegas, Nevada? As stated in the said note: "In fact, the search for the domicile of any person capable of acquiring a domicile of choice is but a search for his 'home'."

That petitioner in the instant case saw fit to remarry and move to Cleveland after obtaining his divorce militates not at all against his bona fide acquisition of a Nevada domicil during the said period of his residence in that state. The facts appearing in this record negative any intention on his part to return to his former place of domicil in Pennsylvania. His decision, made shortly after his divorce, to remove to Cleveland, indicates only that he saw fit to exercise his right to adopt a new domicil of choice, a right which he fully enjoyed, while domiciled in Nevada, and a right which he could exercise or not exercise, as he pleased, and in favor of Ohio or any other state. Had he returned to Pennsylvania, (that is, acted as the divorced spouses did in the *Williams* case), it would have raised only a suspicion that the *animus manendi* may have been wanting." (See *Cheever v. Wilson, infra;*) The *Williams* case decided that such a suspicion is not the basis of a collateral attack upon the Nevada decree. Mr. Justice Jackson in his dissenting opinion so contended, but the majority refused to follow his reasoning. "It is this

Court that accepts these facts as enough to establish domicile," (Jackson, *J.*, 317 U. S. 321, 63 S. Ct. 224, and later at pages 323, 225, he brands the action of the majority as "a demoralizing decision." Would he have used that language if the decision of this Court was as harmless and ineffective as it has been rendered for Pennsylvania litigants by the decision here under review?

The admitted facts of the instant case relating to domicil bring it within the rules as stated by Mr. Justice Holmes in *Williamson v. Osenton*, 232 U. S. 619, 34 S. Ct. 442, namely:

> "The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere (Story, Conflict of Laws, § 43); or, as Mr. Dicey puts it in his admirable book, 'the absence of any present intention of not residing permanently or indefinitely in' the new abode. Confl. L. 2d ed. 111 . . ."

And that petitioner's motive in acquiring a Nevada domicil may well have been to enable him to become a suitor for divorce in its courts was an immaterial circumstance. In the *Williamson* case, for instance, it was stipulated that plaintiff went to Virginia from West Virginia, "with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States Court" in West Virginia. Said Holmes, *J.*:

> "We must take them (the words 'for an indefinite time') to mean: for a time to which the plaintiff did not then contemplate an end. If that is their meaning, the motive for the change was immaterial; for subject to the second question to be discussed, (a wife's right to acquire a separate domicile) *the plaintiff had a right to select her domicil for any reason that seemed good to her.*" (Italics ours.)

In the fairly early case of *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604, 1870, it is stated at page 608, by Swayne, *J.*:

> "It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only

question is as to the reality of her new residence and of the change of domicil. * * * That she did reside in the county where the petition was filed is expressly found by the decree. * * * The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting."

We respectfully suggest that the dissenting opinion of Mr. Justice Drew of the Pennsylvania Supreme Court has correctly applied the law to the facts of petitioner's case in the three paragraphs of analytical discussion which appear on pages 66 and 67 of the Record in this case. Nothing in the opinion of the Superior Court or in the opinion of the majority justices of the Supreme Court answers the contentions there made. It is strange that the unfair charge of fraudulent intent to evade the support order, which appears in the majority opinion (R. 61), should have been allowed to remain there and to afford a peg upon which the decision rests, in the light of the forthright statement of the uncontradicted facts, which appears in the dissenting opinion (R. 67).

By reversing the decision below and by directing the entry of an order in the form suggested by the dissenting opinion (R. 69), this Court will in effect approve not only the result reached in *Estate of Holmes*, 291 N. Y. 261, 52 N. E. 2d 424, but also the underlying reasoning of Chief Judge Lehman as set forth in his opinion for the majority judges in that case, and particularly in that portion thereof which is quoted in the dissenting opinion of Mr. Justice Drew in this case (R. 68).

A substantial federal question is involved.

At the hearing before the County Court Judge (Gunther), petitioner offered a properly certified exemplification of his Nevada court decree (R. 34). In his petition (R.

10), he had relied upon the element of *full faith and credit* to which his said decree of divorce was entitled. Article 4, Section 1 of the Federal Constitution provides that Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State, and Congress is empowered to prescribe by general laws the manner of proving such Acts, Records and Proceedings. At the hearing in the County Court, petitioner, in offering the exemplification of his decree (R. 35), made specific reference to the Act of Congress (R. S. Sec. 905, 28 U. S. C. A., Sec. 687), which provides the method of certification followed in this case and which requires that judicial proceedings so authenticated "shall have such faith and credit given to them in every court within the United States as they have by laws or usage in the courts of the States from which they are taken." Petitioner was relying in the said County Court of Allegheny County upon rights and privileges conferred upon him by the Constitution of the United States and by the aforesaid Act of Congress, passed pursuant to the said constitutional provision. He renewed this contention before the Superior Court and finally in the Supreme Court of Pennsylvania (R. 57). His contention now is that all the said Pennsylvania courts failed to follow the mandatory provision of the aforesaid Section 1 of Article 4 of the Constitution and of the Act of Congress passed pursuant thereto. Petitioner contends here that his complaint in this respect raises a substantial federal question.

Respectfully submitted,

FRED C. HOUSTON,
SIDNEY J. WATTS,
Attorneys for Petitioner.

BAKER & WATTS,
Of Counsel.